Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services	CC Docket No. 95-20
1998 Biennial Regulatory Review – Review of *Computer III* and ONA Safeguards and Requirements	CC Docket No. 98-10

Comments of the Information Technology Association of America

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SUMMARY

The Commission Should Not Lift the *Computer II* Structural Separation Requirement

The Commission continues to act as if it had *won* the *California III* case: The *Notice* assumes that *Computer III* is in effect and that the BOCs are currently free to provide information services on an "integrated" basis, provided they post a CEI plan on their Websites. This is not correct. As ITAA explained in its 1998 comments, the effect of *California III* was to return the Commission to the *Computer II* structural separation regime. The question before the Commission, therefore, is whether current regulatory and market conditions justify *lifting* the structural separation requirement. To do so, the Commission must find either that the risk of BOC anti-competitive conduct has decreased or that the effectiveness of the Commission's non-structural safeguards has increased. The Commission cannot make either finding.

If anything, there is *more* reason for concern about BOC anti-competitive conduct today than there was in 1998. Local competition – which the Commission believed would significantly reduce the BOCs' ability to act anti-competitively – has developed far more slowly than most observers had anticipated. Indeed, during the last three years, the BOCs have actually *expanded* their dominant position by leveraging their control over the local loop to obtain a dominant position in the digital subscriber line ("DSL") market. At the same time, the Commission's recent "clarification" that BOCs can bundle basic telecommunications and information services will plainly create new opportunities for the BOCs to use revenues from their non-competitive basic telecommunications offerings to cross-subsidize their information services. The BOCs' incentives to do so will only grow as they increasingly obtain Commission authorization to enter the in-region, inter-LATA information services market.

Meanwhile, it is even clearer now than it was in 1998 that the Commission's non-structural safeguards cannot provide an adequate substitute for structural separation. In March 1999, the Commission ruled that the BOCs are no longer required to file and obtain advance Commission approval of their Comparably Efficient Interconnection ("CEI") Plans. Instead, the BOCs need merely post a copy of their plans on their Websites. This procedure is significantly less effective than the safeguards established in *Computer III.* The last three years also have provided further evidence of the inadequacy of Open Network Architecture ("ONA") as a mechanism for deterring BOCs from discriminating against ISPs. Simply stated, the ONA regime has been *irrelevant* to ISPs that seek to provide high-speed Internet access services.

While ITAA has long disputed the BOCs' claims that structural separation imposes prohibitively high costs, the costs of structural separation are now lower than ever. Pursuant to Section 272 of the Communications Act, a BOC must provide in-region, inter-LATA telecommunications services through a separate affiliate for at least three years after the date on which it receives authorization. Once the BOC has established this affiliate, the cost of also using it to provide information services would be extremely low.

During the last three years, the Commission has recognized the unique benefits of structural separation in a highly analogous context: ensuring the non-discriminatory provision of loops to CLECs that seek to provide advanced services, such as DSL. If the Commission chooses to lift the structural separation requirement applicable to BOC provision of information services, it must explain why structural separation is well-suited to prevent BOC discrimination against Data CLECs, but is not the appropriate method to prevent similar BOC discrimination against ISPs.

The Commission Should Foster CLEC Competition

While structural separation may be necessary in the near-term, the best means to prevent BOC anti-competitive abuse is to promote the deployment of a broad array of local data transport services. Given the slow pace with which local competition has developed, Commission action is even more important now than in 1998. ITAA therefore urges the Commission to adopt a three-pronged strategy.

First, the Commission should replace ONA with a new regime that would require the BOCs to let ISPs obtain a limited number of unbundled network features and functions that would enable ISPs to develop competitive information services. Because ISPs are end-users, rather than carriers, ITAA does not believe it would be reasonable for the Commission to require the BOCs to provide these features and functions at TELRIC prices. Rather, the Commission should direct the BOCs to make them available, pursuant to tariffs, at just, reasonable and non-discriminatory prices.

Second, the Commission should take measures to promote the growth of the CLEC sector. Specifically, the Commission should: preserve CLECs' rights to receive reciprocal compensation for delivering physically local traffic to ISPs and other end-users; ensure CLECs have adequate co-location rights (including co-location of multi-functional equipment); and ensure that all ILECs comply with the pro-competitive unbundling and resale obligations contained in Section 251 when they provide advanced services.

Finally, the Commission should consider amending its rules to establish a new category of Data-oriented Competitive Access Providers, or D-CAPs. Specifically, ILECs would be required to hand-off aggregated data traffic that originates on a DSL-equipped loop to a D-CAP at the ILEC's central office. This approach would allow D-CAPs to provide advanced packet

transport service to ISPs without having to provide xDSL-based loops to end-users. By lowering the cost of entry, this approach would encourage companies to offer advanced telecommunications services. This is especially important given the difficulty that CLECs are currently having in obtaining funding for infrastructure deployment.

The Commission Should Preserve the Basic/Enhanced Dichotomy

While the Telecommunications Act uses the terms "telecommunications" and "information services," Congress intended to codify the Commission's *Computer II* basic/enhanced dichotomy. In order to promote administrative clarity, the Commission should incorporate the statutory terms "telecommunications" and "information services" in its Rules, while preserving the three descriptive clauses in Section 64.702(a) of the Commission's Rules, which describe the offerings that are not subject to common carrier regulation.

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Comments of the Information Technology Association of America

The Information Technology Association of America ("ITAA") submits these comments in response to the Commission's request to "update and refresh" the record in the above-captioned proceedings.[1]

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. Together with its forty-one affiliated regional technology councils, ITAA represents more than 26,000 companies located throughout the United States. ITAA's members provide the public with a wide variety of information products, software, and services. Among the most significant of these are network-based information services.[2]

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[1] *Further Comment Requested to Update and Refresh Record on Computer III Requirements,* Public Notice, DA 01-620 (Mar. 7, 2001), 66 Fed. Reg. 15,064 (2001) ("*Notice*").

[2] The Commission's Computer Rules currently use the term "enhanced service," while the Communications Act uses the term "information service." As discussed below, ITAA urges the Commission to conform the terminology used in its Computer Rules to that contained in the Act. For simplicity, ITAA will use the term "information service" throughout these comments.

ITAA represents a significant number of information service providers ("ISPs") – ranging from small locally based enterprises to major multinational corporations. ITAA has actively participated in each of the Commission's three *Computer Inquiries*, as well as other Commission proceedings that have addressed Open Network Architecture ("ONA"), Comparably Efficient Interconnection ("CEI"), network disclosure, customer proprietary network information ("CPNI") and other competitive safeguards. Because many of ITAA's member companies remain dependent on the Bell Operating Companies ("BOCs") for the basic transport services – whether dial-up or broadband – that they need to deliver information services to their customers, ITAA's members remain vulnerable to BOC anti-competitive abuses. ITAA therefore continues to have a strong interest in the safeguards at issue in this proceeding and the maintenance of the Commission's pro-competitive policies with respect to telecommunications and information services.

INTRODUCTION

ITAA filed extensive comments in response to the Further Notice of Proposed Rulemaking ("*FNPRM*") that the Commission issued in January 1998.[3] In those comments, ITAA stated that:

- Until effective local competition has taken root, the BOCs will continue to have the ability and incentive to harm competition in the information services market by engaging in cross-subsidization and access discrimination. Therefore, the Commission should require the BOCs to provide all information services through a separate affiliate that complies with the requirements of Section 272 of the Communications Act.

- The Commission should eliminate ONA, which has proven to be a complete failure.

- The Commission should not extend "Section 251-type rights" to ISPs. Instead, the Commission should modify its rules to promote competitive deployment of local data transport services by competitive local exchange

[3] *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements,* Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998) *("FNPRM").*

carriers ("CLECs"), Competitive Access Providers ("CAPS"), and ISPs themselves.

- Because Congress intended to codify the "basic/enhanced dichotomy" adopted in *Computer II,* the Commission should preserve Section 64.702(a) of its Rules, which provides clarity as to the offerings that are not subject to common carrier regulation, but should substitute the statutory terms "telecommunications" and "information service" for the terms "basic service" and "enhanced service" now contained in the Rule.[4]

Marketplace and regulatory developments during the last three years demonstrate that structural separation remains essential. If anything, there is *more* reason for concern about BOC anti-competitive conduct today then there was in 1998. Local competition – which the Commission believed would significantly reduce the BOCs' ability to act anti-competitively – has developed far more slowly than most observers had anticipated. Indeed, the survival of many CLECs is now in question – particularly those offering residential broadband services. At the same time, it is even clearer that the Commission's non-structural safeguards cannot provide an adequate substitute for structural separation. ONA has proven to be irrelevant to the needs of ISPs seeking to provide high-speed Internet access services, while the Commission has weakened the CEI regime. Meanwhile, the BOCs' *incentive* to engage in anti-competitive abuse has increased as they have begun to enter the in-region, inter-LATA information services market.

While structural separation remains necessary in the near-term, the best means to prevent BOC anti-competitive abuse is to promote the deployment of a broad array of local data transport services. ITAA therefore urges the Commission to adopt a three-pronged strategy. First, the Commission should replace ONA with a new regime that would require the BOCs to let ISPs purchase certain FCC-specified network features and functions used to provide information services, on an unbundled basis, at just, reasonable, and non-discriminatory prices. Second, the Commission

[4] Comments of the Information Technology Association of America, CS Docket No. 95-20 (Mar. 27, 1998) ("ITAA 1998 Comments") at 2.

should take measures to promote the growth of the CLEC sector. Third, the Commission should consider amending its rules to establish a new category of Data-oriented Competitive Access Providers ("DCAP").

Finally, ITAA believes the growth of new services, such as digital subscriber line ("DSL"), demonstrates the viability of the "basic/enhanced dichotomy" established in *Computer II*. ITAA therefore continues to urge the Commission to preserve its existing substantive rules establishing the dividing line between regulated and unregulated services, while adopting the "telecommunications/ information services" terminology used in the Communications Act.

I. THE COMMISSION SHOULD NOT LIFT THE *COMPUTER II* STRUCTURAL SEPARATION REQUIREMENT

A. The Ninth Circuit's Decision in *California III* Re-instated the *Computer II* Structural Separation Requirement

The Commission's most recent *Notice* represents another in a long series of Commission efforts – dating back to 1986 – to eliminate the requirement, adopted in *Computer II*,[5] that the BOCs provide all information services through a structurally separate affiliate. The Ninth Circuit has twice rejected the Commission's attempts to achieve this goal – first in *California I*[6] and then in *California III*.[7] The Commission, however, continues to act as if it had *won* the *California III* case: The *Notice* assumes that *Computer III*[8] is in effect and that the BOCs are currently free to provide information services on an "integrated" basis, provided they post a CEI plan on their Websites.

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[5] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d. 384 (1980), *recon.*, 84 FCC 2d. 50 (1980), *further recon.*, 88 FCC 2d. 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[6] *California Public Utilities Commission v. FCC, 905* F.2d 1217 (9th Cir. 1990) (*"California I"*).

[7] *California Public Utilities Commission v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*"California III"*).

[8] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer III*), Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986), *recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *Phase I Order and Phase I Recon. Order, vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150

As ITAA explained in its 1998 comments,[9] the Commission has fundamentally misconstrued the Ninth Circuit's decision in *California III.* In that case, the court considered three issues: (1) the legality of the Commission's decision, in the *Computer III Remand Order*, to replace the structural safeguards of *Computer II* – which the Commission had previously determined were necessary to deter BOC cross-subsidization and access discrimination – with nonstructural safeguards; (2) the legality of the Commission's revised rules governing the use of Customer Proprietary Network Information; and (3) the legality of Commission's decision to preempt certain State regulations.[10] In its decision, the court held that, while the Commission had adequately demonstrated that non-structural safeguards were adequate to deter BOC cross-subsidization, the:

> FCC has failed to explain or justify its change in policy regarding nonstructural safeguards against access discrimination. For this reason, . . . that portion of [the FCC's] order is arbitrary and capricious. We uphold those portions of the *Order on Remand* that implement CPNI rules and that preempt state regulations.

As was the case after *California I*, when the court found that the Commission had not adequately justified its initial decision to lift structural separation, the effect of *California III* was to return the Commission to the *Computer II* structural separation regime.[11] The *only* portions of the *Computer III Remand Order* that were not vacated were those dealing with CPNI and preemption.

(1988), *further recon.*, 4 FCC Rcd 5927 (1989), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991), *recon. dismissed in part*, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1427 (1995).

[9] *See* ITAA 1998 Comments at 9-10.

[10] *California III,* 39 F.3d at 930.

[11] *See Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 5 FCC Rcd 4714, 4714 (1990) (recognizing that he Ninth Circuit's vacation of the original *Computer III Orders* in *California I* reinstated the *Computer II* regime).

While the Commission has waived the structural separation requirements,[12] the agency's findings in *Computer II* remain legally binding. As a result, the Commission's assessment of the merits of applying structural separation to BOC provision of information services must begin with the assessment, made in *Computer II*, that structural separation is necessary to prevent BOC anti-competitive abuse in the information services market. The question before the Commission, therefore, is whether current regulatory and market conditions provide a basis that can justify the Commission's tentative decision to *lift* the structural separation requirement for BOC information services. To do so, the Commission must either find that the risk of BOC anti-competitive conduct (specifically access discrimination) has decreased or that the effectiveness of the Commission's non-structural safeguards has increased. As we now demonstrate, the Commission cannot make either finding.

B. The BOCs Retain the Ability and Incentive to Harm Competition in the Information Services Market

In the *FNPRM*, the Commission tentatively concluded that the local competition provisions adopted in the Telecommunications Act will prevent the BOCs from engaging in access discrimination. Consequently, the *FNPRM* stated, the Commission could lawfully permit the BOCs to provide intra-LATA information services free from structural separation. [13]

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[12] The Commission has held that "to the extent that the effect of *California III* might be regarded as returning regulation of BOC enhanced services to the *Computer II* framework . . . we grant any necessary waivers, pending the completion of remand proceedings, so that the BOCs" can provide information services on an integrated basis." *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 1724, 1730 (1995). Six years later, these waivers remain in effect.

[13] Prior to the adoption of the Telecommunications Act, the Commission's Computer Rules governed the BOCs' provision of information services. However, after February 8, 1996 – when Section 272(a)(2)(C) of the Communications Act became effective – the BOCs were required to provide inter-LATA information services through a Section 272 separate affiliate, while the Commission's Computer Rules continued to govern BOC provision of in-region, intra-LATA information services. Consequently, the *FNPRM* addressed only the question of whether the BOCs should be allowed to provide intra-LATA information services on an integrated basis. *See FNPRM*, 13 FCC Rcd at 6071. The Commission allowed Section 272(a)(2)(C) to sunset on February 8, 2000. *See Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services,* CC Docket 96-149 (Feb. 8, 2000). The Commission has recognized that "*Computer II, Computer III,* and *ONA* requirements continue

This analysis was not correct in 1998 – and it is not correct today. Contrary to the Commission's assumption, Congress' adoption of provisions that have the potential to foster effective local competition in the *future* does not provide a basis for lifting the structural separation requirements *today*. At the present time, ISPs continue to be almost totally dependent on the BOCs for the telecommunications transport services they need to deliver services to their customers. Therefore, the BOCs retain the *ability* to discriminate against unaffiliated ISPs. They are likely to retain this ability for some time. There also is no doubt that the BOCs continue to have a strong *incentive* to discriminate against non-affiliated ISPs. Indeed, this incentive will only grow stronger as these carriers increasingly are allowed to enter the in-region inter-LATA information services market.

1. The BOCs retain the ability to harm competition in the information services market

a. The BOCs still retain a dominant position in the local exchange market

In its 1998 comments, ITAA observed that "[a]t the present time, Information Service Providers remain almost totally dependent on the BOCs for the telecommunications transport services they need to deliver services to their customers."[14] This remains as true today as it was then.

Despite the growth of wireless and cable-based services, the vast majority of residential and small business customers continue to access the Internet by "dialing-up" over the local telephone network.[15] The BOCs' share of the local exchange market remains in excess of

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to govern BOC provision of these [information] services, to the extent that these requirements are consistent with the 1996 Act." *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* 11 FCC Rcd 21905, 21968 (1996). As a result of the sunset of Section 272(a)(2)(C), the Communications Act contains no provision that addresses the safeguards applicable to BOC provision of inter-LATA information services. Therefore, since February 8, 2000, the Commission's Computer Rules have again governed BOC provision of inter-LATA (as well as intra-LATA) information services.

[14] ITAA 1998 Comments at 12.

[15] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services,* 14 FCC Rcd 4289, 4302 (1999) ("The great majority of . . . ISPs rely on access to the BOCs' public switched telephone

90 percent – down only a few percentage points since 1998.[16] As the Commission re-iterated in an earlier phase of this proceeding, so long as "the BOCs remain the dominant providers of local exchange and exchange access services in their in-region states," they will "continue to have the ability to engage in anticompetitive behavior against competitive ISPs."[17]

b. The BOCs have thwarted the development of DSL competition

During the last three years, the BOCs have actually *expanded* their dominant position. Today, approximately three million residential and small business subscribers have acquired high-speed access the Internet using DSL-based services.[18] The BOCs have leveraged their

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network to reach their customers."); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. Transferors, to AOL Time Warner Inc., Transferee*, FCC 01-12, Memorandum Opinion and Order, ¶ 63 (Jan. 22, 2001) (*"AOL-TW Merger Order"*) ("The majority of residential and small business consumers who purchase Internet access services do so from ISPs offering relatively low-speed access . . . over the local telephony plant . . . ."); *id.* at ¶¶ 66-67 ("As of today, DBS providers . . . have captured only a very small share of the market for residential high-speed Internet access." Although fixed wireless firms have made significant investments to provide high-speed Internet access, "such technology is not yet widely available to consumers, and may not be commercially deployed for use by residential consumers on a large scale in the immediate future."); *see also Deployment of Advanced Telecommunications Capability: Second Report* at ¶ 71 (August 2000) (Satellite, fixed wireless and other service providers account for only a six percent share of the market for residential high-speed service.); *id.* at ¶¶ 107, 111 (Terrestrial wireless and satellite technologies are still in the "early stages of development" and account for a small percentage of the market for high-speed Internet access.).

[16] *Compare Local Telephone Competition: Status as of June 30, 2000,* at table 5 (Indst. Anal. Div. Aug. 2000) (estimating ILEC market share of 93 percent) *with Local Competition* at 1 (Indst. Anal. Div. Dec. 1998) (estimating ILEC market share of 97 percent).

[17] *See, e.g., Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services,* 14 FCC Rcd at 4295 (footnotes omitted); *see Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117, 1125-39 (1983) (describing the risks of BOC anti-competitive conduct in the enhanced services market); *see also Application of Ameritech Corp., Transferor and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules,* 14 FCC Rcd 14712, 14797 (1999) ("Incumbent LECs in general have both the incentive and ability to discriminate against competitors in the incumbent LECs' retail markets . . . . This incentive exists in all retail markets in which they participate. Incumbent LECs' ability to discriminate against retail rival stems from their monopoly control over key inputs that rivals need in order to offer retail services.").

[18] Despite the growth of cable modem service, in many markets DSL remains the only means by which ISPs can provide high-speed Internet access service to their subscribers.

control over the local loop to obtain a dominant position in the DSL market.[19] As a result – just as the BOCs have long been able to use their market position in the conventional local exchange services market to impede competition in the market for dial-up information services – the BOCs can use their position in the DSL market to impede competition in the emerging market for high-speed Internet access services.[20]

The BOCs' emergence as the dominant providers of DSL service reflects, to a significant extent, a deliberate effort during the last several years to thwart the development of a competitive market. CLECs that seek to provide DSL services must lease a conditioned local loop from an ILEC, typically a Bell Company. Despite the clear mandate contained in Section 251 of the Communications Act and the Commission's Rules – which require ILECs to provide DSL-conditioned lines to both their competitors and their affiliates on a non-discriminatory basis – CLECs often experience extraordinarily slow DSL-line provisioning, resulting in an inability to serve their ISP customers.[21]

The extent of BOC non-compliance is revealed in the recent report submitted by the Department of Justice ("DOJ") in connection with Verizon's application for authorization to provide inter-LATA services in Massachusetts. The Department found significant and credible evidence that Verizon is not giving CLECs access to DSL-conditioned loops on a timely and

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[19] *See Deployment of Advanced Telecommunications Capability: Second Report,* 15 FCC Rcd 20913 at ¶102 (2000) ("According to public estimates, incumbent LECs served approximately 93% of ADSL subscribers, while the competitive LECs serve just under 7%.").

[20] For example, SBC's provision of DSL service to competing ISPs has been so poor that a leading ISP, Jump.net, had to suspend service to its customers. *See* InternetNews, *SBC Delays Prompt DSL Suspension,* available at <http://www.internetnews.com/isp-news/article/0,,8_429251,00.html>. In addition, the Kentucky Public Service Commission found that Bell South had provided DSL on terms that discriminated against certain ISPs. *See* InternetNews, *Ky. PSC: BellSouth Provided Discriminatory Access,* available at <http://internetnews.com/isp-news/article/0,,8_527761,00.html>.

[21] Many CLECs contend that the BOCs are also charging excessive rates for conditioning loops to provide DSL service.

non-discriminatory basis. For example, DOJ found that available data shows that Verizon fills "significantly fewer" orders for DSL-conditioned loops "within six days for CLECs than for Verizon or its separate data affiliate, VADI." Even when Verizon "restated" the data by "collectively remov[ing] from the performance report more than 83 percent of CLEC orders," Verizon still fell "substantially short" of meeting the established performance standard of filling 95 percent of CLEC orders within six days.[22] DOJ also concluded there was "a substantially lack of parity" between the rate at which CLECs experienced "installation troubles" on DSL lines at the rates at which Verizon and its advanced services affiliate experience such problems.[23] When such problems occurred, moreover, there is "a significant disparity" in the time it takes Verizon to repair loops ordered by CLECs and those use by Verizon and its advanced services affiliate.[24]

Verizon's poor performance in Massachusetts is not an isolated example. In Utah, U S West (now Qwest) precluded competitive providers from obtaining DSL-conditioned lines until well after U S West began marketing and rolling out its own DSL Internet services. Even when U S West officially made DSL-conditioned lines available to competing ISPs in Utah, provisioning was extremely slow. For example, a Utah customer that ordered U S West DSL transport for use with a competitive ISP service had to wait over two months to get a DSL-conditioned line. When the line was finally installed, the U S West installation crew told the customer that he must use uswest.net or be subject to further significant delays.[25] In California,

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[22] *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts,* CC Docket No. 01-9, Evaluation of the United States Department of Justice, at 12-13 (Feb. 21, 2001) ("DOJ Verizon-Massachusetts Evaluation").

[23] *Id.* at 10.

[24] *Id.* at 11.

[25] *See Complaint of Jeff L. Middleton v. Mountain States Tel. and Tel. Company d/b/a U S West Communications, Inc.*, Docket No. 98-049-30, Report and Order (Public Service Comm'n of Utah, April 13, 1999). The recent decision of the D.C. Circuit holding that SBC may not avoid the market-opening obligations contained in Section 251 by establishing a separate "advanced services affiliate" could further complicate this matter. *See Association of*

CLECs have encountered nearly insurmountable obstacles in obtaining "shared lines" that can facilitate the competitive provision of DSL.[26]

Not content to ignore their legal obligation, the BOCs have actively sought to be excused from them. For example, Qwest has asked the D.C. Circuit to rule that the market opening requirements contained in Section 251 of the Communications Act are simply inapplicable to DSL services.[27] More recently, SBC Chairman Ed Whiteacre has asked Congress to amend the Communications Act to expressly exempt ILECs from the obligation to provide competing carriers with access to unbundled network elements at cost-based prices, or to allow competing carriers to purchase retail services at wholesale rates, when the ILECs provide advanced services.[28]

These developments are directly relevant to the present proceeding. In 1998, the Commission believed that local competition would soon erode the BOCs' ability to act anti-competitively. Therefore, the Commission tentatively concluded, allowing the BOCs to provide information services on an integrated basis would create little risk of BOC anti-competitive conduct. However, marketplace developments during the last three years demonstrate the BOCs are prepared to act aggressively to retain – and, indeed, expand – their dominant position and that,

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Communications Enterprises v. FCC, No. 99-1441, 235 F.3d 662 (D.C. Cir. 2001) ("*ASCENT v. FCC*"). The court's confirmation that Section 251 applies to advanced services is a welcome development. However, this decision may encourage those BOCs that have established advanced services separate affiliates to eliminate them. If this occurs, it will easier for the BOCs to engage in discrimination in the provision of the DSL-conditioned loops to their own advanced services operations. The end-result, therefore, could be a further reduction in competition in the market for DSL-based services.

[26] *See Joint Report on the Status of Line Sharing (Exh 3255) on Behalf of Covad Communications Inc., Rhythms Links, Inc., Northpoint Communications, Inc.*, R. 93-04-003 (California Public Utilities Commission, filed July 20, 2000).

[27] *Qwest v. FCC,* No. 98-1410 (D.C. Cir. filed May 17, 1999).

[28] The BOCs have also asked Congress to lift the statutory prohibition on BOC provision of in-region, inter-LATA services to the extent necessary to provide inter-LATA broadband services. This would allow the BOCs to provide inter-LATA broadband services without having to comply with the "competitive checklist" contained in Section 271 of the Communications Act. This, of course, would significantly reduce the BOCs' incentives to open their local markets to competition.

to date, they have been largely successful. As a result, the BOCs retain the ability to harm competition in the information services market. They are likely to do so for the foreseeable future. Structural separation, therefore, remains necessary.

c. The Commission's recent decision to allow bundling will increase the BOC's ability to act anti-competitively

In *California III,* the Ninth Circuit found the Commission's non-structural safeguards to be adequate deterrents to BOC cross-subsidization.[29] However, the Commission's recent decision to allow the BOCs and other dominant ILECs to bundle telecommunications service with separate information services plainly increases the risk of cross-subsidization.

The Commission's prohibition on information services bundling had its origin in *Computer II.* For more than twenty years, most industry participants believed that this prohibition barred a BOC from offering single-price "packages" that included a basic telecommunications service (such as local exchange) and a *separate* information service (such as voicemail or DSL-based Internet access). (This practice is sometimes referred to as "price bundling.") In a recent order, however, the Commission granted the BOCs' request and "clarified" that the prohibition on information service bundling does not prohibit price bundling.[30] ITAA believes that this decision is best viewed as a change in the long-established rules, rather than a clarification.[31] Be that as it

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[29] *See California III,* 39 F.3d at 926.

[30] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace,* CC Docket 96-61, FCC 01-98, at ¶ 43 (Mar. 30, 2001).

[31] *See In the Matter of Policies and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended,* CC Docket No. 96-61; *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets,* CC Docket No. 98-183, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21531 (1998) ("Our rules currently . . . place restrictions on the bundling of telecommunications services with enhanced services. Our current restrictions not only prevent carriers from offering distinct goods and/or services only on a bundled basis, *but also prohibit carriers from offering 'package discounts,' which enable 'customers [to] purchase an array of products in a package at a lower price than the individual products could be purchased separately.'*") (*quoting Bundling of Cellular Customer Premises Equipment and Cellular Service,* 7 FCC Rcd 4028, 4032 (1992) (emphasis added)).

may, it is clear that the Commission's decision will lead to increasing instances in which the BOCs offer single-price prices packages that combine basic telecommunications and separate information services.

The increasing use of price bundling will plainly create new opportunities for the BOCs to use revenues from their non-competitive basic telecommunications offerings to cross-subsidize their information services. In many cases, a BOC will be able to "cover-up" these abuses by claiming it is able to offer the package for a price that is lower than the sum of the prices for the separate components as a result of alleged "efficiencies" resulting from the bundling. Before the Commission can lift the structural separation requirement, it must determine that its existing cost allocation rules remain adequate in light of the increased risk of cross-subsidization resulting from the Commission's sanctioning of price bundling.

2. Entry into the in-region, inter-LATA information services market will increase the BOCs' incentives to act anti-competitively

In 1998, the Commission had not yet granted any BOC authorization, pursuant to Section 271 of the Communications Act, to provide in-region, inter-LATA services. As a result, the BOCs were permitted to play only a limited role in the information services market.[32] For example, the BOCs could not provide end-to-end Internet access services or Internet backbone

[32] The Commission has previously recognized that the statutory prohibition on unauthorized BOC provision of in-region, inter-LATA services applies to both telecommunications and information services. *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* First Report and Order, 11 FCC Rcd 21905, 21932-33 (1996). ITAA strongly supports this conclusion. However, two of the BOCs (Verizon and Qwest) have challenged this decision. The two BOCs claim that the statutory prohibition on unauthorized BOC provision of in-region, Inter-LATA services applies only to telecommunications services and, therefore, that they should be allowed to provide in-region, inter-LATA information services even if they have not satisfied the market-opening requirements contained in Section 271. *See Bell Atlantic Telephone Companies v. FCC* (D.C. Cir. No. 99-1479). After initial briefing, the Commission sought and received a voluntary remand, and is now revisiting its conclusions. *See Comments Requested in Connection with Court Remand of Non-Accounting Safeguards Order,* Public Notice, CC Docket No. 96-149, DA 00-2530, 15 FCC Rcd 21586 (2000). Were the Commission to adopt the BOCs' position, it would decrease the BOCs' incentive to open their local markets to competition while increasing their incentive to engage in anti-competitive conduct in the information services market.

capacity. Consequently, the BOCs had little incentive to harm competition in the information services market.

During the past three years, the Commission has granted four BOC requests for Section 271 authorization.[33] The Commission is likely to grant a significantly greater number in the next few years. Once the BOCs are allowed into the inter-LATA markets, their incentive to use their remaining market power to thwart competition in the information service market will be significantly increased.

C. The *Computer III* Non-structural Safeguards are Even Less Effective Now Than They were in 1998

Because the Commission cannot demonstrate that the risk of BOC anti-competitive conduct has decreased, the only way the agency can justify lifting the structural separation requirement is to show that it has strengthened its safeguards against such conduct. The Commission plainly cannot do so. To the contrary, during the last three years the Commission's *Computer III* safeguards have become even less effective.

1. ONA has clearly failed

In the original *Computer III Order,* the Commission placed heavy reliance on ONA. The agency asserted that, by requiring the BOCs to "fundamentally unbundle" their networks, ONA would serve as a "self-enforcing" means of preventing BOC access discrimination – thereby obviating the need for structural separation.[34] In *California I,* the Ninth accepted the Commission's claim,[35] but vacated the order because the Commission failed to demonstrate that non-structural safeguards were adequate to prevent cross-subsidization. In *California III,*

[33] The Commission has authorized Verizon to offer inter-LATA services in New York, and has approved SBC's applications to provide inter-LATA services in Texas, Kansas, and Oklahoma.

[34] *Computer III Order,* 104 F.C.C.2d at 1063-64.

[35] *See California I,* 905 F.2d at 1233.

however, the Ninth Circuit concluded that the Commission had failed to adequately explain how, given its subsequent decision to "dilute" ONA by eliminating the fundamental unbundling requirement, ONA remains an effective means of preventing access discrimination.[36]

In an effort to justify the effectiveness of ONA as a safeguard against access discrimination, the *FNPRM* asked whether "ONA has been and continues to be an effective means of providing ISPs with access to the . . . unbundled network services they need to structure efficiently and innovatively their information services offerings."[37] The Commission further inquired as to whether "ISPs make use of the ONA framework . . . to obtain . . . services [necessary] to provide their information service offerings."[38] In its 1998 comments, ITAA stated that "the answer to both of these questions is an emphatic 'no.'"[39] Therefore, ITAA concluded, "consistent with Congress' direction that the Commission eliminate unnecessary regulatory requirements, we believe that the Commission should terminate this regulatory exercise."[40]

Regrettably, events since 1998 have only re-confirmed ITAA's views.

In order to facilitate the continued growth of the Internet, ISPs critically need the ability to establish high-speed connections to their residential and business subscribers. In many cases, the only currently available technology for doing so is DSL. If ONA were working as planned, ISPs would have been able to obtain, on an unbundled basis, the network "building blocks" required to provide DSL-based-high speed Internet access service – such as a DSL-conditioned loops, central-

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[36] *California III,* 39 F.3d at 930.

[37] *FNPRM,* 13 FCC Rcd at 6087-88.

[38] *Id.* at 6088.

[39] ITAA 1998 Comments at 20. As ITAA explained, ONA failed to come anywhere close to achieving the goals that the Commission initially established: creating a "self-enforcing" mechanism to prevent the BOCs from discriminating against non-affiliated ISPs, while allowing independent ISPs to make new and innovative uses of the BOCs' networks. *Computer III Order*, 104 F.C.C.2d at 1063-64. There are two reasons for this. First, the Commission failed to require the BOCs to fundamentally unbundle their network. And, second, the Commission insisted that any ISP that wants to purchase ONA Basic Service Elements ("BSEs") pay carrier access charges.

office-based digital subscriber loop access multiplexers ("DSLAMs"), or other functionality – through the ONA regime. This would have allowed ISPs to develop a wide array of innovative broadband Internet access services.

This, of course, has not occurred. Rather, almost all ISPs have obtained end-to-end DSL services from the BOCs pursuant to retail or wholesale tariffs. Simply stated, the ONA regime has been *irrelevant* to ISPs that seek to provide high-speed Internet access services. As a result, ONA plainly does not provide a mechanism for deterring BOCs from discriminating against these ISP. Instead of seeking to rely on ONA as a basis for lifting the structural separation requirement, the proper course for the Commission is to admit that ONA serves no useful purpose and to abolish it.

2. The Commission has weakened CEI

In *Computer III,* the Commission ruled that a BOC could provide basic telecommunications and information services on an integrated basis if it obtained prior Commission approval of service-specific Comparably Efficient Interconnection Plans. This safeguard was intended to deter BOC discrimination by requiring the BOC to demonstrate that it provided non-affiliated ISPs with access to the basic telecommunications services underlying its information services on terms and conditions that are "comparable" to those on which the BOC provides basic telecommunications services to its own information services operation.[41]

During the last three years, the Commission has significantly weakened this safeguard against discrimination. In an order released in March 1999, the Commission ruled that the BOCs

[40] ITAA 1998 Comments at 20.

[41] *Computer III Order,* 104 F.C.C.2d at 1035-42.

are no longer required to file and obtain advanced Commission approval of their CEI Plans. Instead, the BOCs need merely post a copy of their plans on their Websites.[42]

This procedure is significantly less effective than the safeguards established in *Computer III.* Previously, a BOC that wanted to provide basic telecommunications and information services on an integrated basis had an affirmative obligation to file a plan with the Commission that demonstrates that it would not engage in access discrimination. ISPs and other interested parties had an opportunity to review the submission, and to file comments that raised questions and pointed out any obvious deficiencies before the BOC could provide the service. The knowledge that the Commission would rigorously review the BOCs' submissions and the public comments doubtless served as a potent deterrent to BOC abuse. The end-result was to prevent discrimination *before* it happens.

Today, by contrast, a BOC can offer information services on an integrated basis without any opportunity for prior Commission or public review. If, after the service has been introduced, an ISP believes that a BOC is engaging in discriminatory conduct, the ISP's only recourse is to file a formal complaint pursuant to Section 208 of the Communications Act. To do so, he ISP must gather information to document the discrimination, inform the BOC of its intention to file a formal complaint, and seek to negotiate a voluntary settlement with the BOC. If the negotiation is not successful, the ISP must prepare a detailed complaint and must participate in the Commission's often-protracted adjudicatory process. This process is likely to deter all but the largest ISPs from challenging the BOC discrimination. Moreover, even if a challenge is brought, during the pendency of the adjudicatory process, the BOC's discrimination generally will

[42] *Computer III Further Remand First Report & Order,* 14 FCC Rcd at 4297-4305.

continue unchecked. If the Commission wishes to lift the structural separation requirement, it must explain how this "diluted" form of CEI will adequately deter BOC access discrimination.

D. Structural Separation Remains the Only Effective Means to Prevent BOC Anti-competitive Abuse

1. The Commission has recognized the benefits of structural separation

In its 1998 filing, ITAA re-iterated its long-standing view that "structural separation is the *only* regulatory method that has been proven to be effective at deterring (and facilitating discovery of) discrimination."[43] This remains true today. Indeed, during the last three years, the Commission has recognized the unique benefits of structural separation in a highly analogous context: ensuring the non-discriminatory provision of loops to CLECs that seek to provide Advanced Services, such as DSL.

Like an ISP, a "Data CLEC" depends on the ILECs' underlying networks to provide services. Specifically, a CLEC seeking to provide DSL-based services typically leases a conditioned local loop from an ILEC. As a result, an ILEC can impede competition in the advanced services market by providing access to its DSL loops on a discriminatory basis. Section 271 of the Communications Act seeks to address this issue by requiring that, in order to obtain authorization to provide inter-LATA services in any state within its service region, a BOC must demonstrate that it provides CLECs with non-discriminatory access to its local loops.[44] The Commission has specifically held that this obligation requires the BOC to demonstrate that it provides non-discriminatory access to DSL-conditioned loops.[45]

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[43] ITAA 1998 Comments at 13 (emphasis in original).

[44] *See* 47 U.S.C. § 271(c)(2)(B)(iv).

[45] *See Local Competition Order,* 11 FCC Rcd 15499, 15692-3 (1996).

In the *Bell Atlantic Section 271 Order,* adopted nearly two years after the *FNPRM,* the Commission was presented with significant evidence (which the Department of Justice found credible) that Bell Atlantic (now Verizon) had not provided Data CLECs with access to DSL conditioned loops on a non-discriminatory basis. The Commission, however, determined that Bell Atlantic was not likely to engage in discrimination in the future because it had agreed to provide advanced services through a separate affiliate. The Commission explained that:

> Providing advanced services through a separate affiliate would reduce the ability of a BOC to discriminate against competing carriers with respect to xDSL services. Significantly, under this structure, the BOC would be required to treat rival providers of advanced services the same way that it treats its own separate affiliate. Because the BOC's separate affiliate would use the same process as competitors to conduct such activities as ordering loops, and would pay an equivalent price for facilities and services, the creation of the affiliate would ensure a level playing field between the BOC and its advanced services competitors.[46]

If the Commission chooses to lift the structural separation requirement applicable to BOC provision of information services, it must explain why structural separation is well-suited to prevent BOC discrimination against Data CLECs, but is not the appropriate method to prevent similar BOC discrimination against ISPs.[47]

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[46] *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of New York,* CC Docket No. 99-295, FCC 99-404, at ¶ 332 (Dec. 22, 1999), *aff'd sub nom. AT&T v. FCC,* 220 F.3d 607 (D.C. Cir. 2000).

[47] Most recently, a number of State Public Utility Commissions have considered requiring the BOCs to structurally separate their wholesale and retail operations. As in the case of an advanced services separate affiliate, the goal is to create an effective and self-enforcing means to prevent discrimination by requiring the BOC's wholesale operations to provide both non-affiliated CLECs and its own retail operations with access to the local loop and other "bottleneck" facilities on the same terms.

2. The cost of structural separation has decreased

ITAA has long disputed the BOCs' claims that structural separation imposes prohibitively high costs.[48] During the last three years, two developments have occurred that further reduce the costs of structural separation.

First, the Commission has begun to grant the BOCs authorization to enter the in-region, inter-LATA market. During the next few years, the BOC are likely to obtain authorization in most (if not all) States. Pursuant to Section 272 of the Communications Act,[49] a BOC must provide in-region, inter-LATA telecommunications services through a separate affiliate for at least three years after the date on which it receives authorization. Once the BOC has established this affiliate, the cost of also using it to provide information services would be extremely low.[50] For that reason, ITAA continues to believe that the Commission should allow any BOC to satisfy the *Computer II* structural separation requirement by providing all information services through a separate affiliate that complies with the requirements of Section 272.

Second, the growth of the Internet has significantly reduced whatever efficiencies may once have resulted from the joint provision of basic telecommunications and information services. Internet applications are platform-independent. That is, the same application, once placed in Internet protocol, can be delivered over telephone, cable, or wireless networks. There is no operational benefit to having the same entity provide the transport and service. Thus,

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[48] The Commission has good reason to be skeptical of the BOCs' self-serving claims regarding the cost of structural separation. A recent study by Economics and Technology, Inc. has shown that Verizon significantly over-stated the cost of carrying out the Pennsylvania PUC's direction that it structurally separate its wholesale and retail services. While Verizon claimed that the costs would exceed one billion dollars, ETI demonstrated that the true incremental cost would be approximately $ 41 million. *See* Declaration of Lee L. Sewlwyn, *Consultative Report on Application of Verizon-Pennsylvania, Inc. for FCC Authorization to Provide In-region, InterLATA Service in Pennsylvania*, Docket No. M-00001435 (Feb. 12, 2001).

[49] *See* 47 U.S.C. § 272(a) & (f) (Supp. 2000).

[50] ITAA recognizes that the statutory requirement that a BOC provide in-region, inter-LATA information services through a Section 272 separate affiliate has sunset. However, nothing in the Act restricts the Commission's authority to impose a comparable requirement.

physically separating the BOCs' basic telecommunications services operations from their information service operations would not impose a significant cost on the BOCs.

II. THE COMMISSION SHOULD ADOPT A THREE-PRONGED STRATEGY TO PROMOTE THE GROWTH OF LOCAL DATA TRANSPORT SERVICES

While structural separation may be necessary in the near-term, the best means to prevent BOC anti-competitive abuse is to promote the deployment of a broad array of local data transport services. Given the slow pace with which local competition has developed, Commission action is even more important now than in 1998. ITAA therefore urges the Commission to adopt a three-pronged strategy. First, the Commission should replace ONA with a new regime that would require the BOCs to let ISPs purchase certain FCC-specified network features and functions used to provide information services, on an unbundled basis, at just, reasonable and non-discriminatory prices. Second, the Commission should take measures to promote the growth of the CLEC sector. Finally, the Commission should consider amending its rules to establish a new category of Data-oriented Competitive Access Providers.

A. The Commission Should Require the BOCs to Let ISPs Obtain Specific Network Features and Functions Used to Provide Information Services, on an Unbundled Basis, at Just, Reasonable and Non-discriminatory Prices

The Commission has acknowledged that ONA did not lead to the "fundamental unbundling" of the BOCs' networks that was intended to provide a "self-enforcing" check on BOC discrimination against non-affiliated ISPs. In the *FNPRM*, the Commission asked CLECs – which, under Section 251 of the Communications Act, can obtain unbundled network elements from the ILECs at cost-based prices – can adequately meet the needs of ISPs for unbundled network features and functions necessary to provide information services, or whether the Commission should provide

"section 251-like" rights directly to ISPs.[51] In its 1998 comments, ITAA told the Commission that, while it welcomed the growth of the CLEC sector, it did "not believe . . . that CLECs will be able to meet fully the needs of the information services industry in all markets."[52] Nonetheless, ITAA did not believe it was necessary or desirable to provide ISPs with "section 251-like" rights.

Three years later, it is even clearer that Congress' decision to allow CLECs to purchase unbundled network elements at cost-based prices – while a very significant development – is not a fully effective check on BOC access discrimination against non-affiliated ISPs. At the time the Commission issued the *FNPRM,* the agency took a very broad view of the extent of the unbundling it could require under Section 251.[53] In light of the Supreme Court's decision in the *Local Competition* case,[54] however, it is now clear that Section 251 is not a mandate to require the BOCs to physically unbundled all network elements that feasibly can be unbundled. Rather, it is a limited – and, in many cases, transitional – provision that allows the Commission to require unbundling of those elements that, as a practical matter, a CLECs would need to lease in order to promptly enter the local telecommunications market.[55] Moreover, given the difficulties currently facing the CLEC sector, many ISPs do not have the option of obtaining service from a CLEC.

In light of the above, ITAA now believes the Commission should consider replacing ONA with a new regime under which the Commission would give ISPs a limited right to purchase specified features and functions of the BOCs' networks that can be used to provide information services, on an unbundled basis, at just, reasonable and non-discriminatory prices. During the

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[51] *See FNPRM*, 13 FCC Rcd at 6091-92.

[52] ITAA 1998 Comments at 24.

[53] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (*"1999 CEI Order"*).

[54] *See AT&T v. Iowa Public Utilities Board,* 525 U.S. 366, 387-88 (1999).

[55] *See 1999 CEI Order,* 15 FCC Rcd at 3699-704.

Commission's initial consideration of ONA, the information service industry (including ITAA) made clear that there were at least five core network elements that the BOCs would have to unbundle if ONA was to be an effective means of preventing access discrimination.[56] Specifically:

- The BOCs must allow ISPs to physically collocate ISP-provided equipment in the BOCs' central offices.
- BOC-provided switching and transmission links must be unbundled in order to allow ISPs to provide these components themselves or purchase them from other providers.
- ISPs must be given the ability to "interposition" ISP-provided equipment between an end user's CPE and a BOC's central office.
- Business and private line service should be made available without having to obtain a BOC-provided local loop.
- ISPs must be given direct access to remote line concentration equipment, which is required to efficiently provide service to geographically concentrated groups of customers.[57]

Despite the passage of time, this remains a good starting-point for Commission's development of a list of network features and functions that the BOCs should be required to make available to ISPs.

The Commission's experience in implementing Section 251 demonstrates that physical unbundling of the BOCs' networks is technically feasible. ITAA emphasizes, however, that it is not seeking the essential Section 251 right – the right to obtain all FCC-specified UNEs. That right should continue to be restricted to CLECs that, as a practical matter, must use UNEs to provide competitive telecommunications services. Rather, ITAA is asking the Commission to consider requiring the BOCs to allow ISPs to obtain a limited number of unbundled network

[56] *See, e.g.*, Comments of ADAPSO, *Filing and Review of Open Network Architecture Plans*, CS Docket No. 95-20 at 52-53 (Apr. 18, 1988).

[57] *See generally* Hatfield Associates, Open Network Architecture: A Promise Not Realized, at 96-106 (Apr. 5, 1988) (describing the BOCs rejection of various industry proposals regarding ONA) (filed in the record of CC Docket No. 88-2).

features and functions that would enable ISPs to develop competitive information services. Because ISPs are end-users, rather than carriers, ITAA does not believe it would be reasonable for the Commission to require the BOCs to provide these features and functions at TELRIC prices. Rather, the Commission should direct the BOCs to make them available, pursuant to tariffs, at just, reasonable and non-discriminatory prices.

B. The Commission Should Foster the Growth of CLEC Competition

Despite the current challenges facing the sector, ITAA continues to believe that a key element of the Commission's efforts must be to promote CLEC competition. There are a number of ways in which the Commission can do so.

Preserve CLEC reciprocal compensation. One of the "bright spots" in the competitive landscape is the significant inroad that CLECs have made in providing dial-up service to ISPs. This progress, however, would be jeopardized if the Commission were to eliminate the requirement that ILECs pay terminating compensation to CLECs that deliver traffic to ISP.[58] These payments are intended to compensate the CLEC's for the cost that they incur in terminating ILEC-originated traffic. While some modifications may be appropriate, eliminating this obligation could drive some CLECs from the market. This, in turn, would lead to reduced competition and higher prices. The end-result would be to increase the costs incurred by ISPs – and, ultimately, their subscribers – thereby slowing the growth of the Internet.

[58] Requiring ILECs to compensate CLECs for delivering traffic to ISPs is plainly within the Commission's jurisdiction. In the *Access Charge Appeal,* the Eighth Circuit held that traffic between a subscriber and an ISP, while physically local, is jurisdictionally mixed and cannot feasibly be separated in inter-state and intra-state components. Accordingly, the court found that Commission is well within its authority to either to establish a federal access regime for this traffic or to delegate authority to the States to regulate it. *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542-3 (8th Cir. 1998). Similarly, the Commission could either establish a federal reciprocal compensation regime for this traffic or could direct the states to treat ISP-bound traffic in exactly the same way they treat other physically local traffic that is destined for a business customer that interconnects a jurisdictionally mixed-used private line network to the local network – as local traffic subject to reciprocal compensation.

Ensure CLECs have adequate co-location rights. As a result of a remand from the D.C. Circuit, the Commission is currently reconsidering the extent to which CLECs will be allowed to co-locate equipment in the ILECs' central offices.[59] Of particular importance to ISPs the question of whether CLECs will be able to collocate "multi-functional" equipment.[60] The pendency of this *Collocation Order Remand* has increased uncertainty in the investment community, thereby exacerbating the difficulties that CLECs are incurring in their effort to obtain continued funding. ITAA urges the Commission to promptly issue a new order in this docket, which – to the extent permitted by the Act – will provide CLECs with broad and clear rights to collocate multi-functional equipment used to provide telecommunications services.

Require advanced services unbundling and resale. Section 251 of the Communications Act seeks to foster competition by requiring ILECs to let CLECs obtain unbundled network elements necessary to provide telecommunications services and to sell retail telecommunications services at wholesale rates. The D.C. Circuit has now held that the Commission erred when it ruled that SBC could avoid the obligations to unbundle network elements and allow resale of advanced services (such as DSL) by setting up a separate "advanced services affiliate."[61] While this decision expressly addresses only the Commission's order approving the SBC-Ameritech merger, it plainly has implications for all ILECs. The Commission should move quickly to ensure that all ILECs comply with the pro-competitive obligations of Section 251 when they provide advanced services.

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[59] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Further Notice of Proposed Rulemaking, 15 FCC Rcd 20913 (2000).

[60] CLECs require collocation of this equipment in order to access the full features and functions of the unbundled network elements that they use to provide service to their ISP customers.

[61] *See ASCENT v. FCC,* 235 F.3d at 668.

C. The Commission Should Initiate a Proceeding to Consider ITAA's D-CAP Proposal

In its 1998 comments, ITAA urged the Commission to modify its rules to allow a new category of provider – which ITAA referred to as a Data-oriented Competitive Access Provider or D-CAPs – to transport data between subscribers and their ISP.[62]

ITAA's proposal is based on the rules adopted in the Commission's *Expanded Interconnection* proceeding. There, the agency recognized that the obligation to provide "end-to-end" service can significantly deter competitive entry.[63] The Commission therefore required the ILECs to unbundle the basic elements of their networks – loop, switching, and local transport – so that a CAP could provide only the segment requested by its customers. Under this approach, CAPs were able to provide the high capacity transport links between the ILECs' central office and the points of presence of their customers' interexchange carrier.

ITAA urges the Commission to initiate a new proceeding to adapt the *Expanded Interconnection* regime to promote the development of advanced telecommunications services that can meet the broadband needs of ISPs and their customers. The Association believes that implementing this proposal would require only relatively minor changes to the Commission's existing regulations. Specifically, ILECs would be required to hand-off aggregated data traffic that originates on a DSL-equipped loop to a D-CAP at the ILEC's central office.[64] The ILEC would be required to charge the D-CAP a cost-based interconnection rate that reflects its cost to: (1) strip off voice traffic (if required); (2) packetize and multiplex the data traffic onto the D-CAP's trunks so

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[62] *See* ITAA 1998 Comments at 29, 30.

[63] *See Expanded Interconnection with Local Telephone Company Facilities,* First Report and Order, 7 FCC Rcd 7369, 7373 (1992).

[64] ILECs are increasingly locating the main distribution frame at a remote terminal located between the subscriber's premises and the serving central office. In such cases, the Commission should require the ILEC to hand-off the aggregated data traffic at the remote terminal.

that the D-CAP can carry the traffic on its own high-capacity packet network; and (3) physically interconnect with the D-CAP. To deter discrimination, the ILECs would be required to charge the same rate when it hands this traffic off to its information service affiliate.

This approach would allow D-CAPs to provide advanced packet transport service to ISPs without having to provide xDSL-based loops to end-users. By lowering the cost of entry, this approach would encourage companies to offer advanced telecommunications services. This is especially important given the difficulty that CLECs are currently having in obtaining funding for infrastructure deployment. Moreover, by separating the provision of loop service from the provision of local packet transport, it would reduce the ability of the ILECs to use their control over DSL-based loops to discriminate in favor of their information services affiliates and against non-affiliated ISPs.[65]

In 1998, ITAA expressed its belief that, in most markets, the combination of CLECs and D-CAPs would be able to meet the needs of ISPs and subscribers. Nonetheless, ITAA recognized that it may be a long time (if ever) before such competitive services are universally available. Consequently, ITAA urged the Commission to amend its rules to allow ISPs themselves to obtain aggregated data traffic from the ILECs on the same terms as the D-CAPs. Given the challenges facing the CLEC sector, providing such rights to ISPs is more important than ever.

The proposed regime is well within the Commission's legal authority. In the *Access Charge Order Appeal,* decided after the close of the period for comments on the *FNPRM,* the

[65] In a filing made after the close of the comment period in response to the *FNPRM,* NTIA expressed support for the approach that ITAA had proposed. *See* Letter from Hon. Larry Irving, Administrator, National Telecommunications and Information Administration, Department of Commerce to Hon. William E. Kennard, Chairman, Federal Communications Commission, at 8 (July 17, 1998) (The Commission should consider adopting rules that "allow carriers with DSL customers to interconnect with different carriers that provide local data transport service to ISP customers. Such rules . . . [would] eliminate the need for an ISP targeting a particular geographic market to become a customer of every DSL carrier in that market. Instead, the ISP could make the best deal for local transport service and be assured of reaching all potential subscribers in a local market via interconnection with DSL service providers in that market.").

Eighth Circuit recognized that traffic between ISPs and their subscribers is jurisdictionally mixed, and cannot feasibly be separated into inter-state and intra-state components.[66] Consequently, while the Commission has acted within its authority by allowing this traffic to be carried over state-tariffed business lines, the Commission has ample authority to develop a parallel federal regulatory regime applicable to traffic between a subscriber and an ISP that originates on a DSL-based loop.

III. THE COMMISSION SHOULD PRESERVE THE BASIC/ENHANCED DICHOTOMY ESTABLISHED IN *COMPUTER II*

The *FNPRM* asked whether the Commission's "definition of 'basic service' and the 1996 Act's definition of 'telecommunications service' should be interpreted to extend to the same functions."[67] In its comments, ITAA stated that the Commission should – and, indeed, must – do so.

ITAA observed that the distinction between regulated "basic" services and non-regulated "enhanced" services, which the Commission established in *Computer II,* has been enormously successful. "The dichotomy," ITAA explained, "is clear-cut and easily applied, thereby promoting administrative efficiency and business certainty. At the same time, by limiting regulation to underlying transport services, the agency's regulatory regime has fostered a vibrant, robustly competitive, and growing information technology industry."[68]

ITAA went on to demonstrate that, while the Telecommunications Act used the terms "telecommunications" and "information service," Congress intended to codify the Commission's

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[66] *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542-3 (8th Cir. 1998).

[67] *FNPRM*, 13 FCC Rcd at 6066-67.

[68] ITAA 1998 Comments at 4.

basic/enhanced dichotomy.[69] ITAA further urged that, in order to promote administrative clarity, the Commission should incorporate the statutory terms "telecommunications" and "information services" in its Rules, while preserving the three descriptive clauses in Section 64.702(a) of the Commission's Rules, which provide clarity as to the offerings that are not subject to common carrier regulation.[70]

Here, again, the passage of time has only strengthened ITAA's position. Recent years have seen the introduction of a wide range of new services. The Commission has been able to apply the framework established by the Commission in *Computer II* to these offerings. For example, the Commission has recognized that new, advanced telecommunications services – such as frame relay or DSL-based transport services – are subject to common carrier regulation.[71] This has enabled the Commission to ensure that dominant carriers that provide these services comply with a range of regulatory requirements designed to ensure that end-users – including ISPs – that rely on these services have access to them on just, reasonable, and non-discriminatory

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[69] *See* ITAA 1998 Comments at 4. As ITAA explained, the Telecommunications Act's definitions of both telecommunications and information services were taken, in all relevant respects, from the Modification of Final Judgment ("MFJ"). The definitions contained in the MFJ, in turn, were taken from an earlier Senate bill, S. 898 § 103(19), 97th Cong., 1st Sess. (1981) that was introduced in order to codify the Commission's *Computer II* basic/enhanced dichotomy. *See* S. Rpt. No. 97-170, 97th Cong., 1st Sess., at 4 & 24 (1981). The Commission, moreover, has already determined that Congress intended "all services the Commission has previously considered to be 'enhanced'' to be included in the "the statutory term 'information service.'" *Compare* 47 U.S.C §§ 153(20) & 153(43) *with United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982) (Sections IV.J and IV.O of the MFJ). Because there is no overlap between information services and telecommunications services, *See in the Matter of Federal-State Board on Universal Service,* 12 FCC Rcd 8776, 8808-9 (1997), then only those services currently classified as basic services fall within the definition of the term telecommunications service.

[70] See ITAA 1998 Comments at 8. Under this approach, Section 64.702(a) of the Commission's Rules would be revised to read:

> Information services offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. For purposes of this subpart, a service will be deemed an information service if it is offered over common carrier transmission facilities used in interstate communications, and if it employs computer processing applications that: (1) act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; (2) provide the subscriber additional, different, or restructured information; or (3) involve subscriber interaction with stored information.

[71] *See, e.g., GTE Telephone Operating Companies Tariff No. 1*, 13 FCC Rcd 22466 (1998).

terms.[72] At the same time, application of the *Computer II* framework has ensured that the Internet has remained unregulated, thereby providing significant public interest benefits.[73] The time has come for the Commission to eliminate any remaining uncertainty regarding the status of the *Computer II* "basic/enhanced dichotomy."

[72] The Commission has also recognized that it can and should use the forbearance power granted by the Telecommunications Act to forebear from regulating non-dominant carriers that provide telecommunications services.

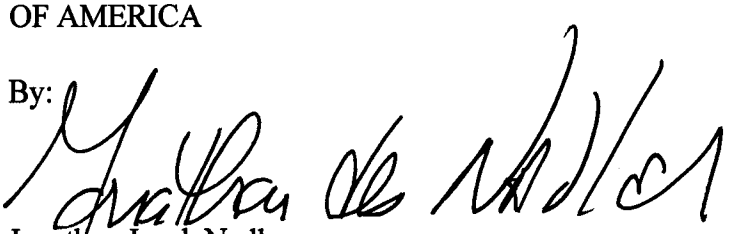
[73] *See generally The FCC and the Unregulation of the Internet,* OPP Working Paper No. 31 at 23 (July 1999).

CONCLUSION

For the foregoing reasons, the Commission should: (1) require the BOCs to provide all information services through a separate affiliate that complies with Section 272 of the Communications Act; (2) eliminate ONA and adopt a three-pronged strategy to promote the deployment of local data transport services; and (3) modify Section 64.702(a) of the Commission's Rules by replacing the terms "basic" and "enhanced service" with the terms "telecommunications" and "information service."

Respectfully submitted,

INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

By: 

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